IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,

Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR AARON COPLAND, *et al.*, AS *AMICI CURIAE*

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Aaron Copland, *et al.*, submit this brief as *amici curiae* in support of the petitioners, American Society of Composers, Authors and Publishers ("ASCAP"), *et al.*, seeking reversal of the judgment entered by the Court of Appeals for the Second Circuit on August 8, 1977. Eubie Blake, Sammy Cahn, Betty Comden, Hal David, Ira Gershwin, Adolph Green, Gian Carlo Menotti, Vincent Persichetti, Ned Rorem, William E. (Billy) Taylor, Virgil Thomson, and

the Estates of Bela Bartok, Edward Kennedy (Duke) Ellington and Igor Stravinsky join in this brief as *amici curiae*. Consent to submit this brief has been obtained from all parties and their letters have been lodged in the clerk's office of this Court.

INTEREST OF *AMICI CURIAE*

The *amici curiae*, Aaron Copland, *et al.*, are composers of music, authors of lyrics for music, and members of ASCAP. These *amici curiae* have interests in this litigation of several kinds.

The decision of the panel majority of the Court of Appeals for the Second Circuit to the effect that ASCAP's method of licensing performance rights for the *amici curiae's* copyrighted works constitutes price-fixing, which is illegal *per se* under Section 1 of the Sherman Act, may be read to mean that *amici* and other members of ASCAP were parties to an illegal combination. *Amici* may be exposed to treble damage liability and may have to incur literally ruinous legal expenses in defending themselves. *Amici* have, therefore, a great personal interest, quite apart from their interest in ASCAP's survival and effectiveness, in a reversal by this Court of the judgment of the Court of Appeals and invalidation of the novel *per se* rule upon which that judgment rests.

The *per se* rule created by the Court of Appeals majority, if it were applied according to its apparent rationale, would appear not only to outlaw blanket licensing but any form of licensing that an organization like ASCAP could

engage in. If that were to happen, and if ASCAP were effectively destroyed, these *amici* and other current members of ASCAP and BMI would be left without effective means of seeing that royalties were paid for the performance of their works by the tens of thousands of users of music in the United States. Composers, authors, and publishers would be thrown back to the unhappy condition in which they existed prior to the organization of ASCAP. The copyright laws of the United States gave such composers, authors, and publishers of music the legal right to receive royalties for the performance of their works but that legal right was largely worthless because of the utter impossibility of private individuals learning of all such performances and either negotiating satisfactory licenses or suing for infringement. Since the new law announced by the Court of Appeals would preclude the operation of any other organization serving the same functions as ASCAP, *amici* and others similarly situated would be legally and practically helpless to protect themselves and their means of livelihood.

If the new *per se* rule, and the accompanying decision that *amici's* copyrights have been misused are not overturned, *amici* will certainly suffer heavy losses of royalty income because of the expenses of litigation incurred by ASCAP in litigation with myriads of licensees all over the United States, possible treble damage awards against ASCAP and themselves, and the possibility that royalties may not be collectible, either by ASCAP or *amici* on copyrights held to have been misused.

QUESTIONS PRESENTED

1. Whether the diminution of price competition that necessarily occurs within any joint venture or any other economic integration, such as a partnership or corporation, is *per se* illegal under Section 1 of the Sherman Act.

2. Whether ASCAP can be held to have fixed prices for performance rights to musical works when every user has the option of having the license fee set by the District Court for the Southern District of New York.

3. Whether ASCAP can be held to have fixed prices for performance rights to musical works when every user has the option of ignoring ASCAP and negotiating directly for licenses with copyright owners.

STATEMENT OF THE CASE

Respondent Columbia Broadcasting System, Inc. (CBS), filed an antitrust action against petitioners ASCAP, Broadcast Music, Inc. (BMI), and certain individual members of each organization, alleging that the use of blanket licenses by ASCAP and BMI violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2. A blanket license is one by which ASCAP for a stated term and royalty authorizes the licensee to perform any copyrighted work that ASCAP has the right to license. CBS alleged that price competition was eliminated between members of ASCAP, that licensing copyrights not used with those that were used constituted an illegal tie-in, that by dealing through ASCAP copyright owners were engaged in a concerted refusal to deal, and that ASCAP had attempted and achieved monopolization. CBS also charged that these activities constituted copyright misuse. CBS sought only injunctive and declaratory relief.

The District Court severed the issues of liability and relief and, after a nonjury trial of liability, held that the defendants had not violated the Sherman Act and had not misused their copyrights. It dismissed the complaint. The opinion of the district court is reported at 400 F. Supp. 737.

The Court of Appeals' opinion, reported at 562 F.2d 130, held that none of the District Court's extensive findings of fact were "clearly erroneous," and unanimously affirmed the holdings that the defendants had not engaged in any of the illegalities charged, with one exception. A majority of the three-judge panel held as a matter of law on the facts found by the District Court that the blanket license involves price-fixing and so is rendered illegal *per se* by Section 1 of the Sherman Act as interpreted by *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940). The copyrights were held to have been misused for the same reason. Price-fixing was held to exist because members licensing through ASCAP did not engage in price competition with one another but shared in the proceeds of the license. The majority held further that there is a defense to price-fixing that would otherwise be illegal where the price-fixing "is absolutely necessary for the market to function at all," 562 F.2d at 136. The defense was held unavailable here because CBS could obtain licenses directly from individual copyright owners, a right guaranteed by ASCAP's consent decree with the government.

The case was remanded for consideration of a remedy consisting of "some form of per use licensing," 562 F.2d at 140. A per use license involves a royalty payment for copyrighted works actually performed. The majority

stated, however, that the blanket license, which it had held illegal *per se*, need not be prohibited in all circumstances. "The blanket license is not simply a 'naked restraint' ineluctably doomed to extinction," because some licensees might find it desirable, 562 F.2d at 140. The court also indicated that the "market necessity" defense might permit blanket licensing with respect to some classes of licensees, apparently without regard to their desires.

The concurring judge stated that he agreed that a remand for remedy proceedings was proper so that a practical method of adding per use licensing could be evolved, but added, "I do not agree that 'the ASCAP blanket license in its present form is price-fixing and with respect to the television networks cannot be saved by a "market necessity" defense,'" 562 F.2d at 141. This appears to be a statement that ASCAP has not violated the law but that relief should be granted to CBS.

INTRODUCTION AND SUMMARY OF ARGUMENT

There is no dispute over facts between petitioners and respondent that affects the legal issue presented here. That issue is whether the blanket license used by ASCAP, and approved by its consent decree with the United States, involves price-fixing made *per se* illegal by Section 1 of the Sherman Act. *Amici* submit that price-fixing is not involved in ASCAP's blanket license for each of three reasons.

First, the Court of Appeals majority ruled that price-fixing existed solely because composers, authors, and publishers, when they license through ASCAP, do not compete on royalty rates. But that fact does not constitute illegal price-fixing within any known or possible interpretation of

Section 1 of the Sherman Act. Every economic integration of persons, whatever its form—whether a partnership, corporation, or joint venture—has precisely the same effect. That degree of restraint, if such it be termed, which is inherent in the existence of ASCAP or any other licensing organization is also inherent in every economic unit involving more than a single person. The principle that would hold ASCAP's blanket licenses unlawful would necessarily condemn all such economic units. The invalidity of that principle is further shown by the fact that the Court of Appeals majority felt compelled to create a "market necessity" defense, despite the fact that *per se* rules allow of no defenses, and also to remand for a remedy involving the employment of per use licenses, which is at least equally vulnerable on the principle of illegality the court invented.

Second, as the Court of Appeals for the Ninth Circuit held in *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968), under ASCAP's consent decree with the United States, every licensee, including CBS, has the option of having the license fee set by the United States District Court for the Southern District of New York. This means that, at the licensee's sole option, ASCAP can be prevented from setting any fee.

Third, as *K-91* also held, and as the consent decree explicitly provides, any licensee is free to deal directly with any composer, author, or publisher and to bypass ASCAP altogether. This option, too, means that the licensee can prevent ASCAP from setting any fee by refusing to deal with ASCAP.

Each of these legal propositions independently requires that the judgment of the Court of Appeals be reversed and that judgment be entered for petitioner ASCAP.

ARGUMENT

I

ASCAP'S BLANKET LICENSE DOES NOT INVOLVE PRICE-FIXING CONDEMNED BY THE SHERMAN ACT BECAUSE THE EFFECT UPON RIVALRY BETWEEN MEMBERS IS ONLY THAT INHERENT IN AND INSEPARABLE FROM THE EXISTENCE OF ANY LICENSING ORGANIZATION OR OF ANY ECONOMIC UNIT CONSISTING OF MORE THAN A SINGLE PERSON

This point is the most crucial of the three we advance to the development of the antitrust laws generally. A decision against ASCAP would necessarily have devastating effects either upon the doctrinal coherence of the law or upon business and the economy. It is obvious that the economy will not be judicially destroyed, and, therefore, it is the coherence of the law that will suffer. ASCAP ought not to be held liable under a rule that will not be applied to all.

A. ASCAP's Blanket License Does Not Involve Price-Fixing.

The panel majority's opinion shows on its face that it thought price-fixing was involved not merely in ASCAP's blanket license but in almost any conceivable activity of

ASCAP as an agent for composers, authors, and publishers. (The concurring judge took the curious position that ASCAP had not violated the law but that relief should be entered against it.) The majority stated:

> The charge that there is a restraint of trade by price fixing is founded upon the conception that when any group of sellers or licensors continue to sell their products through a single agency with a single price, competition on price by the individual sellers has been restrained. When the single price includes compensation even for those in the combination whose wares are not used, it may be said that the single price has been increased to take care of such compensatory factors which are irrelevant to true competition. But even if the single price is *reasonable*, the determination of how much each copyright owner gets from the common pot is an artificial fixing of the price to that member of the combination for his composition.

562 F.2d at 137-38 (emphasis in the original).

The majority concluded that there existed, therefore, a combination which tampers with price structures and thus engages in unlawful activity within the meaning of *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940). It continued:

> There is no doubt that when ASCAP issues a blanket license, the royalty received by the individual writer or publisher is the result of at least the threshold elimination of price competition for the performing rights in his own particular composition . . . .

562 F.2d at 136.

It is to be noted that the Court of Appeals' "price-fixing" rationale has nothing to do with the form of licensing

used by ASCAP; it is an objection to ASCAP determining the compensation of its members, and that objection would apply unless members bid competitively through ASCAP to get their works performed.

Though it is not the case that ASCAP pays compensation to those whose "wares" or copyrights are not used (most members never receive an ASCAP check), the clear legal error of this reasoning lies in applying to an economic integration, or joint venture, the rule of *per se* illegality appropriate to cases like *Socony-Vacuum* involving a naked restraint, where the suppression of competition is the sole object of the combination. ASCAP, on the contrary, performs a vital and legitimate economic function that cannot be performed at all if no diminution of competition within the organization is permitted by law. In this, it resembles such familiar examples of economic integration as law firms, corporations, and league sports. It makes no more antitrust sense to say that the Sherman Act forbids the existence of ASCAP than it would to say the law equally prohibits law firms, corporations, or sports leagues.

ASCAP was created because individual composers, authors, and publishers were helpless to police the performance of their copyrighted works and thus did not realize the royalty income to which the law entitled them. ASCAP, therefore, took over the functions of licensing and policing that were utterly beyond the capabilities of individuals or smaller associations. Without ASCAP and BMI these functions would not be done. A law journal comment shows why:

> Without ASCAP, licenses for individual performances would have to be negotiated, and all performances

> would have to be policed by all composers. The costs would be enormous. A single radio station, for example, may broadcast as many as 60,000 performances of recorded musical compositions each year, involving as many as 6,000 separate compositions. As of 1975 there were 7,158 radio stations in the United States, as well as some 714 television stations and thousands of restaurants, bars, hotels, theaters, and other businesses that use ASCAP music. It has been estimated that there are now over one billion licensed performances of ASCAP music annually.*

That is why ASCAP, which is a clearinghouse for performing rights to copyrights held by 16,000 composers and authors and 6,000 music publishers, must exist. Moreover, there is within ASCAP all the competition between copyright owners that is possible. Each copyright owner is compensated through a complex formula that reflects the popularity of, and demand for, his product. If the owner's work is not performed, he is paid nothing. This highlights the essential dissimilarity between ASCAP and a cartel in which the inefficient producer is guaranteed a share of the market and a profit in order to dissuade him from competing.

No more competition is possible within a joint venture in licensing and policing, which ASCAP is. The decree under which ASCAP operates provides that its members may deal individually with licensees. But it is both physically and commercially impossible for ASCAP itself to become a market resembling a stock exchange by keeping in continual communication with all of its members, advising them of every potential licensee's interests and asking

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* Comment, "CBS v. ASCAP: *Performing Rights Societies and the Per Se Rule*," 87 Yale L.J. 783, 786 (1978) (footnotes omitted).

for bids, advising again of competitive offers, and continuing the process until all bids were in and the licensee able to pick among them. Since there are over one billion licensed performances of ASCAP music annually, there would obviously be many more billions of bids and offers. Not only would the process be enormously expensive, if it were technologically achievable, but every successful composer, author and publisher would have to spend all or a substantial part of his day at a computer terminal receiving information about what every other member was asking and continually adjusting his own royalty demands. Though that is obviously impossible, it would be the only process that could avoid the Court of Appeals' ruling that there must be a competitive market inside a joint venture.

CBS has claimed that ASCAP, with modern computer technology, could run an internal market for CBS. ASCAP has denied that. But if we assume, solely for the argument here, that CBS is correct, it would make no difference under the law. On such an assumption, ASCAP might be able to run a computerized internal market for any one licensee of any type, but what has been said shows the impossibility of bringing copyright owners together in a bidding situation as to all licensees, or, indeed, for any large number of the tens of thousands of licensees. There is no Sherman Act principle that CBS or any other licensee has a right to an internal bidding system that might, arguendo, be created for one but not for all. Every licensee would have an equally good claim and the law does not require that CBS be preferred.

In this inability to function and simultaneously provide a fully competitive market internally, ASCAP precisely

resembles a major law firm. When clients come to a law firm with complex pieces of work, the firm assembles the talents of the lawyers at its call and determines the rewards of each. The panel majority's rationale would call that a combination that tampers with price structures and illegal *per se* under *Socony-Vacuum*. Presumably, in order to comply with the Sherman Act, the individual lawyers in the firm must bid against one another to work on every client's case.

The law has condemned naked restraints, it has had difficulty with ancillary restraints, but it has never, until now, made the mistake of condemning that diminution of competition which, of necessity, occurs within an economic venture such as a partnership or ASCAP. As Judge Taft put it at the outset of antitrust policy: "when two men became partners in a business, although their union might reduce competition, this effect was only an incident to the main purpose of a union of their capital, enterprise, and energy to carry on a successful business, and one useful to the community." *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 280 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). Taft was talking not about ancillary restraints, which he discussed next, but about the inherent restraint that occurs whenever men cooperate in a useful economic function.

The rationale advanced by the two judges in the Court of Appeals, contrary to this ancient and sound learning, if applied consistently, would make any economic integration unlawful—not merely ASCAP and law partnerships but corporations, sports leagues, joint ventures, and family farms—because each is a combination of persons who could

operate individually, yet, within the unit, are rewarded not by open market competition with one another but according to a determination made by the economic unit of how much each should receive.* Any principle making that illegal is inconsistent not merely with antitrust but with even the most primitive economy. It is precisely what Justice Holmes warned against: "an interpretation of the law which in my opinion would make eternal the *bellum omnium contra omnes* and disintegrate society so far as it could into individual atoms." *Northern Securities Co.* v. *United States*, 193 U.S. 197, 411 (1904) (dissenting opinion).

The Court of Appeals majority struck down blanket licensing to CBS on a rationale that is irrelevant to blanket licensing but which would outlaw the existence of ASCAP and all other economic integrations.

B. The Court of Appeals' Need to Invent a "Market Necessity" Defense Shows the Fallacy of the "*per se* Rule" It Also Invented.

The Court of Appeals majority itself apparently realized that it had fashioned a *per se* rule of impossible overbreadth and severity, for it attempted to compensate by inventing a so-called "market necessity" exception. There never before has been an exception to a *per se* rule; indeed the concept of a defense to a *per se* rule is a contradiction in terms. The meaning of this new antitrust notion is

* The function of determining payments to the owners of economic inputs which the Court of Appeals describes as *per se* illegal is, in fact, the distinctive function, and the reason for the existence of, firms. *See* A. Alchian & H. Demsetz, "Production, Information Costs, and Economic Organization," 62 *Am. Economic Rev.* 777 (1972). That is why the Court of Appeals majority's legal rationale demands what is flatly impossible.

unclear since the Court of Appeals said only: "In short this concept holds that price-fixing is *per se* illegal except where it is absolutely necessary for the market to function at all," 562 F.2d at 136. The court majority did say that it would have reached the same result as the Ninth Circuit in *K-91* because a blanket license to a single radio station would be "entirely justifiable as an example of market necessity." 562 F.2d at 140 n.26. "Indeed," the court majority continued, "CBS concedes that market necessity would probably justify ASCAP blanket licenses for restaurants, night clubs, skating rinks and even radio stations." *Id.*

CBS may concede that, but there is no reason to suppose that the great number and variety of licensees in this country will accept CBS' concession on their behalf and the prospect is for almost endless litigation between ASCAP and its members, on the one hand, and, on the other, all types of licensees, each of them contending that market necessity does not obtain as to it. Many other types of organizations which necessarily reduce internal competition among their members may expect similar litigation.

The only apparent meaning of the market necessity defense is that price-fixing is allowable where costs of doing business (transaction costs) would otherwise be prohibitively, or perhaps unreasonably, high. Entertaining such a defense would place an antitrust court in the position very much like that of an agency regulating prices. The court would receive evidence of the costs of doing business through a joint venture or partnership and then take and compare evidence of the costs of doing business if each of the members of the joint venture or partnership were required to operate singly. The judgment to be made would then be one of degree. Since "necessity" is the test,

the presence of merely substantial additional costs would presumably not establish the defense, but at some point the costs of separate operation would become so impressive that economic integration would be allowed. That would be an impossible test to administer, it certainly contemplates a function ill-suited to courts, and it is no different in its basic rationale than the reasonable-price defense to price-fixing that the Sherman Act long ago, and quite properly, rejected. *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897); *United States* v. *Joint Traffic Ass'n*, 171 U.S. 505 (1898); *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271 (1898), *aff'd*, 175 U.S. 211 (1899); *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927).

The problems created by the need for a "market necessity" defense in an overbroad rule of illegality are greater even than this, however. The defense manages to be at once too broad and too narrow. It is too broad because any defendant can raise it in any price-fixing case—contending, for example, that price competition would increase uncertainties, unnecessary duplication of efforts, and so on, thus increasing costs to the point where the market would not function without the agreement. The defense might almost invariably fail, but its availability would complicate and lengthen trials and destroy the efficacy of the *per se* rules. Indeed, if the defense is accepted as legitimate in price-fixing cases, it would be equally applicable to cases involving other *per se* rules—those, for example, against naked horizontal market divisions and concerted refusals to deal.

The concept of market necessity is also too narrow because it does not, so far as one can tell, permit economic

integrations which greatly improve the efficiency of economic activity but which are not "absolutely essential" to the existence of some market for that activity. When lawyers form a partnership they necessarily limit the economic rivalry that would otherwise exist between them, but clients find that the firm gives more effective service than they could obtain by dealing with the same number of lawyers individually. For many kinds of work, the partnership is a more efficient economic unit than the sole practitioner. But can it be said that the partnership is "absolutely essential" for the market for legal services to function at all? It would seem not. Nor could it be said that leagues, with their inevitable lessening of economic rivalry between the members, are utterly indispensable to the existence of professional sports, nor that grocery retailing could not exist without stores manned by more than one person. Thus, the Court of Appeals majority's bizarre version of the *per se* rule, which prohibits the inherent and unavoidable diminution in price competition between persons within an economic unit, would attack the most usual and useful forms of economic integration, and the "market necessity" defense would save only those few where the costs of doing business individually, without help, were prohibitive beyond question.

C. The Fallacy of the "*per se* Rule" Invented by the Court of Appeals Is Also Shown by the Fact That the Court Proposes a Remedy, Per Use Licensing, Which Would Be at Least Equally Invalid Under the New Rule.

That the Court of Appeals' rationale is incapable of consistent application is further shown by the fact that the court remanded the case for the fashioning of a remedy

involving per use licensing although that form of licensing is at least equally objectionable under the theory by which blanket licensing was held unlawful. We have shown that the objection is really to the existence of a performing rights society and, for that reason, no shift in license practices will eliminate the feature the majority below erroneously saw as price-fixing. Thus, the per use license, which will require ASCAP to determine royalties, will necessarily involve that "threshold elimination of price competition" that the Court of Appeals held to be the vice of the blanket license.

The function of an antitrust remedy is to replace an illegal situation with a legal one, not to give the plaintiff his choice of distribution practices without regard to their respective legal statuses.

It is obvious that the majority of the Court of Appeals outlawed blanket licensing by ASCAP on a legal theory that is not merely incorrect but impossible. It is also apparent, we submit, that blanket licensing cannot be held unlawful under the Sherman Act without adopting a theory that would make the very existence of a licensing and policing organization illegal. This is the primary reason the judgment of the Court of Appeals should be reversed. There are others.

II

ASCAP CANNOT FIX THE LICENSE FEE CHARGED ANY LICENSEE IF THE LICENSEE EXERCISES ITS RIGHT UNDER THE CONSENT DECREE TO HAVE THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK SET THE FEE

The Court of Appeals for the Ninth Circuit rejected a similar challenge to ASCAP's blanket license in *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968). *K-91* arose when several copyright owners sued a radio station operator for copyright infringement because the operator of K-19 had played their musical compositions on the air without the owners' permission or consent. K-91 raised antitrust charges, including an allegation that ASCAP and the copyright owners, who were ASCAP members, had conspired to fix prices in violation of Section 1 of the Sherman Act. The antitrust charges were raised both as a defense of misuse and as a basis for a counterclaim seeking triple damages. The district court ruled in favor of the copyright owners.

The Court of Appeals affirmed:

> ASCAP cannot be accused of fixing prices because every applicant to ASCAP has a right under the con-

> sent decree to invoke the authority of the United States District Court for the Southern District of New York to fix a reasonable fee whenever the applicant believes that the price proposed by ASCAP is unreasonable, and ASCAP has the burden of proving the price reasonable. In other words, *so long as ASCAP complies with the decree, it is not the price fixing authority.*

372 F.2d at 4 (emphasis added).

In the present case, the majority of the Court of Appeals for the Second Circuit held that the decree was of no assistance to ASCAP because ASCAP fixed the licensee fee and reasonableness is no defense to price fixing. That reasonableness is no defense is true but irrelevant. The Ninth Circuit's point, which is clearly correct, is that when the district court sets the royalty, ASCAP does not set any price whatever, and that all licensees or prospective licensees have the option of getting the royalty set by the district court in every instance. Thus, if ASCAP's licenses did constitute price fixing, and we have shown that they do not, it would be price fixing that every licensee could easily avoid.

III

ASCAP CANNOT FIX THE LICENSE FEE CHARGED ANY LICENSEE IF THE LICENSEE EXERCISES ITS RIGHT UNDER THE CONSENT DECREE TO BYPASS ASCAP COMPLETELY AND DEAL DIRECTLY WITH ANY COMPOSERS, AUTHORS, AND PUBLISHERS IT WISHES

The Ninth Circuit, in *K-91*, found another feature of the consent decree that exonerated ASCAP:

> There is an additional reason why the activities disclosed by this record do not violate the antitrust laws. ASCAP's licensing authority is not exclusive. The right of the individual composer, author or publisher to make his own arrangements with prospective licensees, and the right of such prospective licensees to seek individual arrangements, are fully preserved.

372 F.2d at 4.

There seems no escape from this reasoning. Most users find it preferable in terms of cost and effort to license from ASCAP. That is, as we have shown, a major reason for ASCAP's existence. Any user that believes its cost would be lowered by dealing with composers, authors, and publishers directly, is entirely free to do so. This fact also demonstrates that ASCAP is not a cartel but a clearinghouse and that, unlike any price-fixing arrangement known to the

antitrust laws, makes no effort whatever to dissuade its members from dealing with anyone at any price they choose.

The truth is that CBS has not the remotest interest in what it calls "competition"—the opportunity to negotiate prices directly with individual composers, authors, and publishers. It already has that opportunity. It demands instead a form of license condemned by its own legal theory. The per use license, which CBS seeks and which the Court of Appeals said it was entitled to, also requires ASCAP to determine the royalties paid its members and thus necessarily involves the same "threshold elimination of price competition" the Court of Appeals held to be the vice of blanket licensing.

CBS has no right to demand, and the court no power to order, the adoption of a form of licensing that, on the rationale of the decision, is legally indistinguishable from the form of licensing held illegal. Since blanket and per use licenses have the same characteristics with respect to ASCAP's determination of royalty payments to copyright owners, they are either both lawful or both unlawful. If the blanket license is lawful, as we think it plainly is, no court has the authority to order the per use license substituted for it. If both licenses are unlawful, no court can permit either to be used.

If the novel legal theory invented by the Court of Appeals were correct, the only appropriate remedy would be the prohibition of *any* licensing by ASCAP to *any* licensee and a requirement that every licensee negotiate directly with individual copyright holders. But that is precisely the remedy CBS does not seek, and it is the choice now completely available to it under ASCAP's consent decree.

CONCLUSION

For the reasons stated, the Court of Appeals decision should be reversed.

Respectfully submitted,

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